Petition granted
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No. 462

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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1950

L. J. E. HERWIG, PETITIONER

v.

GEORGE J. SCHOENEMAN, COMMISSIONER OF INTERNAL REVENUE

and

FRANK PACE, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the United States District Court for the District of Columbia (R. 34-36) is not reported. The Court of Appeals for the Dis-

trict of f Columbia Circuit dismissed the appeal without c opinion.

JURISDICTION

The ororder of the Court of Appeals was filed on May 5, 1 1950 (R. 45); petitioner's motion for rehearing g was denied on July 21, 1950 (R. 56). By order of of Chief Justice Vinson dated October 18, 1950, the he time within which to file a petition for a writ of of certiorari was extended to and including Decembe ber 18, 1950. The petition for a writ of certiorari ari was filed on December 18, 1950. The jurisdictio ction of this Court is invoked under 28 U. S. C. C. 1254(1).

QUESTION PRESENTED

Whethe ether judicial review of the decision of an Army Ret Retiring Board, clearly not available by any direct pro proceedings, can be achieved by means of a spurious us tax proceeding, in turn improperly brought in ht in the district court.

STATUTES INVOLVED

Relevan evant statutory materials are set forth or referred t ed to in the course of the argument, *infra*, pp. 2-3, 8, 3, 8, 9, 10.

STATEMENT

Petition titioner, as an officer retired in 1919, pursuant to R. S. 1 S. 1251, for disability incurred in service, became en ne entitled in 1942 to income tax exemption as to his d his disability pay (Pet. 4, 5). Section 22 (b) (5) of 5) of the Internal Revenue Code, 26 U. S. C.

22 (b) (5). Petitioner, who had continuously objected to the nature of his retirement (Pet. 4; R. 1-4, 37), sought to utilize the refund thus available to renew his complaint, culminating the effort by a formal petition addressed to the Commissioner of Internal Revenue in 1946 (R. 10; Pet. 5). This petition requested a finding by the Commissioner that the 1919 Army retiring proceeding was void and that petitioner was not entitled to the tax exemption for disability pay (R. 10; Pet. 5).[1] The Commissioner replied that he had no authority to set aside the findings of another governmental department (R. 10; Pet. 5).

In the following year, petitioner included his

[1] Here, and throughout this proceeding, petitioner seems to argue that acceptance by him of the tax exemption necessarily involves acceptance of the stigma of mental instability, the basis for his 1919 retirement. First, it should be noted that qualification for the tax exemption requires no showing of any specific disability but only of the general fact of disability. Second, the War Department retirement order, ordered by the district court to form part of the record on appeal (R. 25), states no more than that petitioner was retired for service incurred disability. To the extent that detailed accounts of petitioner's disability are contained in War Department files, such files are confidential. A. R. 380-5, par. 7. The text of the retiring order, which appears to have been omitted from the filed record, is as follows:

> War Department
> Washington, D. C.
>
> September 30, 1919.
>
> The proceedings and findings of the Retiring Board are approved by the President, and by his direction, Captain Leopold J. H. Herwig, Cavalry is retired from active service, under the provisions of Section 1251, Revised Statutes.
>
> /S/ BENEDICT CROWELL
> /T/ BENEDICT CROWELL
> *Assistant Secretary of War.*

disability pay, as "retirement pay," as gross income in his 1946 income tax return made to the Collector of Internal Revenue at Richmond, and showed $346.72 as tax due (R. 19; Pet. 6).[2] Petitioner did not pay the tax and, after demand for payment was ignored, the Collector issued a warrant of distraint on October 15, 1947 (Pet. 6).[3]

This suit was thereafter instituted against George J. Schoeneman, Commissioner of Internal Revenue, Stuart L. Crenshaw, Acting Collector of Internal Revenue,[4] and Kenneth C. Royall, Secre-

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[2] Petitioner's 1946 income tax return, also ordered to be included in the record (R. 25), showed his income as follows:

Retirement pay	$1980.00
Other Income	1011.63
Total	$2991.63

The deductions and personal exemptions amounted to $1166.80, *i.e.*, more than petitioner's other income; hence no tax was due unless the retirement pay was taxable.

[3] Petitioner noted a reference to prior correspondence in his return, including presumably his return to the Commissioner of Internal Revenue of the prior refund received from the Collector of Internal Revenue at Richmond and similarly discursive correspondence with both revenue offices (R. 18-19; Pet. 5). This notation obviously could not suffice to stay ordinary procedure for collection of the tax shown. Petitioner did not utilize any of the variety of administrative or judicial steps available to an objecting taxpayer. On the contrary, he had insisted on his obligation to pay the tax, going so far as to return refunds (Pet. 5). Petitioner has indicated repeatedly that he ought to pay the tax and that he is willing to do so, provided he is relieved of the stigma of his retirement record (Pet. 5, R. 9).

[4] The complaint against defendant Crenshaw was dismissed for lack of jurisdiction since he was not an inhabitant of the District of Columbia. D. C. Code (1940), Sec. 11-308. Petitioner has failed to include Mr. Crenshaw's name in the caption of the petition for a writ of certiorari; it is therefore assumed that he does not seek a review of this dismissal.

tary of the Army [5] (R. 8-13). The action was "for injunction—to suppress invalid record—declaratory judgment and to quash warrant of distraint" (R. 8). Specifically, the complaint charged mainly that the Secretary of the Army was committing a fraud on the United States by paying tax exempt disability pay to petitioner in that the basis of such payments, the 1919 retiring procedure, was void (R. 8-10). Based on this charge, petitioner sought to enjoin the use of his retirement record (R. 13). Next, the complaint sought to restrain the Commissioner and Collector from seeking to collect a tax on petitioner's disability pay on the ground that, under 26 U. S. C. 22 (b) (5), it is tax exempt (R. 10-11, 13). In addition, petitioner sought a declaratory judgment as to his sanity and his income tax liability (R. 13).[6]

The district court dismissed the complaint on the ground that it constituted no more than an attempt to attack the 1919 retiring proceedings and that such proceedings are not subject to judicial review (R. 34-36). On motion, the court below dismissed

[5] By order dated December 8, 1949 Gordon Gray was substituted for Kenneth C. Royall, and on June 28, 1950, Frank Pace was substituted for Gordon Gray.

[6] The complaint and the petition herein assert that, pursuant to the Act of June 29, 1943, 57 Stat. 249, 10 U. S. C. 985 (a), petitioner is entitled to disability pay at the rank of Major rather than Captain, the rank at which he was retired (Pet. 4; R. 10). No specific prayer for relief seems to have been predicated upon this contention (R. 31). In any event, this claim, to the extent to which it has merit, presents a cause of action over which a district court exercises no jurisdiction. 28 U. S. C. 1346 (d). Petitioner's proper forum is the Court of Claims.

the appeal (R. 38, 45). A motion for rehearing was denied (R. 47, 56).

ARGUMENT

1. Petitioner has continually sought to attack and have set aside the 1919 procedure whereby he was retired with disability pay. In apparent recognition of the unavailability of direct judicial review, he has sought relief, prior to the instant proceeding, in the War Department and in the legislature (Pet. 4; R. 4-4). In this proceeding, petitioner has attempted to create jurisdiction to review by indirection, by manipulating the tax exemption privilege available to him. As set forth above, p. 5, the device chosen by petitioner is to charge the Secretary of the Army with fraud in paying to him tax exempt disability pay. At the same time, petitioner sets up entirely inconsistent charges against the Commissioner and Collector of Internal Revenue to protect himself against the consequences of his position. *Supra*, p. 5. We submit that both courts below properly singled out, and based their actions on, the central and, in fact, sole purpose of this proceeding, petitioner's effort to obtain judicial review of his 1919 retirement. Such retirement proceedings are not reviewable (*Reaves* v. *Ainsworth*, 219 U. S. 296, 306; *French* v. *Weeks*, 259 U. S. 326; *Creary* v. *Weeks*, 259 U. S. 336) and the dismissal of the instant suit below was plainly correct.

Nor is there any merit to petitioner's effort to evade the plain rule applied below by insisting that he is here entitled to make a collateral attack upon the retirement proceeding (Pet. 3, 7 ff.). Collateral attack is permissible only as an incident to proceedings instituted for an independent purpose. *Mitchell* v. *Village Creek Drainage District*, 158 F. 2d 475, 478 (C. A. 8); Restatement of the Law of Judgments, Sec. 11, Comment a; Sec. 112, Comment f. Here, even assuming that the retirement board proceeding was void and open to collateral attack in appropriate circumstances, petitioner cannot prevail. The desired primary relief, sought as against the Secretary of War, is that the record of petitioner's retirement proceeding be suppressed and not used (R. 13). This is direct attack, in no way incident to any independent litigation. Nor is anything added by petitioner's request that the Secretary of the Army be enjoined from interfering with the taxing authority of the United States with respect to petitioner's tax liability, the prayer which petitioner derives from his charge of fraud on the revenue by the Secretary (R. 13). Aside from other obvious weaknesses of this position, it is difficult to understand petitioner's standing to raise the point. Petitioner has a simple remedy which requires no judicial intervention. He can pay the tax.

2. Brief mention may be made of petitioner's remaining contentions, namely, his right to a de-

claratory judgment as to his sanity, his income tax liability, and to an injunction against enforcement of the warrant of distraint (R. 13).

a. Lunacy proceedings are governed in the District of Columbia by D. C. Code (1940 ed.) Secs. 21-310ff. which provide for hospitalization, affidavits of disinterested persons, reports by a medical commission, a possible jury trial and other special features. To the extent that the district court participates in these proceedings, it does so only under this statutory scheme. It possesses no other jurisdiction in sanity matters. These statutory requirements cannot be circumvented nor independent sanity jurisdiction created by recourse to the declaratory judgment provisions of 28 U. S. C. 2201. The Declaratory Judgment Act does not create jurisdiction where none existed before. *Doehler Metal Furniture Co.* v. *Warren*, 129 F. 2d 43, 45 (C. A. D. C.), certiorari denied, 317 U. S. 663; *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612. In any event, the district court properly exercised its judicial discretion by refusing to burden these proceedings with a declaratory inquiry to determine petitioner's sanity. *Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491, 494.

b. The district court properly refused to entertain declaratory proceedings in order to ascertain petitioner's tax status. 28 U. S. C. 2201 expressly excepts controversies with respect to Federal taxes

from the scope of the district court's jurisdiction to grant declaratory judgments. *Wilson* v. *Wilson*, 141 F. 2d 599 (C. A. 4). Petitioner claims that the particular circumstances of his case require the court to read an exception into the plain wording of the statute. We know of no case where the mandate of the Declaratory Judgment Act has been disregarded. But assuming that the district court had jurisdiction to grant declaratory judgment in federal tax matters, it would have been reversible error had the district court assumed jurisdiction in this case. Petitioner has no actual need for a declaration of his rights. No prosecution for tax fraud nor any other serious detriment can possibly threaten him if he claims his tax exemption relying on the order retiring him for service incurred disability. *Eccles* v. *Peoples Bank*, 333 U. S. 426.

c. Petitioner finally asks that the tax authorities be permanently restrained from collecting his 1946 income tax and that the warrant of distraint be quashed (R. 13; Pet. 10, 11). Here petitioner is met with the prohibition contained in 26 U. S. C. 3653 providing that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Petitioner, however, claims that the tax claim is illegal and that such unusual and exceptional circumstances exist in this case as to bring him within the well-recognized equitable exceptions to 26 U. S. C. 3653. *Miller* v. *Standard Nut Margarine*

Co., 284 U. S. 498, etc. (Pet. 11). The mere illegality of the tax to be collected is no ground for the issuance of an injunction. Additional equities must be shown to justify it. *Dodge* v. *Osborn*, 240 U. S. 118.

An examination of the cases cited by petitioner (Pet. 11) discloses the presence of truly exceptional circumstances and the inadequacy of tax refund provisions in each of the cases in which an injunction was granted.[7] Here, petitioner has been provided with many remedies—judicial and otherwise—in which he can litigate his tax liability. 26 U. S. C. 272 provides for a petition to the Tax Court of the United States which operates as a stay of the tax collection until the decision of the Tax Court has become final; after payment of the tax, petitioner may petition for a refund, 26 U. S. C. 322, and sue for a refund in the District Court or the Court of Claims if he is not satisfied with the decision of the Commissioner of Internal Revenue.

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[7] *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, contracts entered into in reliance on earlier determinations of the tax authorities; *John A. Gebelein, Inc.* v. *Milbourne*, 12 F. Supp. 105 (D. Md.), inadequate refund provisions; *United States* v. *Butler*, 297 U. S. 1, no injunction involved; *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, and *Lipke* v. *Lederer*, 259 U. S. 557, penal statute disguised as tax and purported taxes imposed without notice and opportunity for a hearing; *Concentrate Mfg. Corp.* v. *Higgins*, 90 F. 2d 439 (C. A. 2), injunction denied; *Midwest Haulers* v. *Brady*, 128 F. 2d 496 (C. A. 6) and *John M. Hirst & Co.* v. *Gentsch*, 133 F. 2d 247 (C. A. 6), reliance on earlier rulings of the tax authorities, refund provisions inadequate, no method of review which would operate as a stay; *Barnard* v. *Carey*, 60 F. Supp. 539 (N. D. Ohio), injunction denied.

26 U. S. C. 3772; 28 U. S. C. 1346 (a) (1). Petitioner clearly has an adequate remedy at law which obviates the need for the equitable relief. *Allen* v. *Regents*, 304 U. S. 439, 449; *Harvey* v. *Early*, 66 F. Supp. 761, 767 (W. D. Va.), affirmed, 160 F. 2d 836 (C. A. 4). See, also, *Eccles* v. *Peoples Bank*, *supra*, at 431.

The allegation that payment (R. 11) of the tax —subject to a suit for refund—would be ruinous is unsupported and inadequate. Plaintiff paid income taxes on his retirement pay before the 1942 amendment to the Revenue Act granted him the exemption from taxation. Moreover, by filing a petition with the Tax Court he could have obtained a review coupled with a stay of the tax collection.

Plaintiff's predicament, if there is one, is of his own making. He could have avoided it easily by claiming his tax exemption in his tax return, or following any one of the many remedies through which the taxpayer may seek the correction of errors in the computation or assessment of the income tax. His interests are still fully protected by these remedies.

CONCLUSION

The decision below is correct; there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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